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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER AND Laird Bell, Executors of the Estate of William H. Redington, Deceased, petitioners

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–19) is reported in 23 B.T.A. 635. The opinion of the Circuit Court of Appeals (R. 31–37) is reported in 62 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1932. (R. 38.) A petition for rehearing was denied January 28, 1933.

(R. 38–39.) The petition for a writ of certiorari was filed April 26, 1933, and was granted May 29, 1933. (R. 43.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there should be included in the gross estate of a decedent dying after the effective date of Section 402 (d) of the Revenue Act of 1921 one half the value of property acquired by the decedent and his wife as joint tenants prior to September 8, 1916, the effective date of the first Federal estate tax statute.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–18.

STATEMENT

The facts as stipulated (R. 13–14) and found by the Board of Tax Appeals (R. 15) may be summarized as follows:

William H. Redington died a resident of Evanston, Illinois, on October 8, 1923, and was survived by his wife, Frances A. Redington. (R. 15.)

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants, certain real estate situated in Evanston, Illinois, and used by them as a homestead. Under the laws of Illinois, title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with the

right of survivorship. Frances A. Redington made no contribution at any time to the cost of the real estate. (R. 15.)

The Commissioner included the entire value of the real estate in the decedent's gross estate as subject to tax. (R. 13–14.) The Board of Tax Appeals determined that only one half the value of the property was taxable (R. 19), and both parties sought review. The Commissioner's appeal was subsequently dismissed on his motion. (R. 35.) On the taxpayers' appeal, the court below affirmed the decision of the Board of Tax Appeals. (R. 35–37.)

SUMMARY OF ARGUMENT

Section 402 (d) of the Revenue Act of 1921 (p. 14, *infra*) provides that there shall be included in the gross estate of a decedent the value of all property held by him jointly with any other person. The sole question presented in this case is whether this provision should be construed to require the inclusion in the decedent's gross estate of at least one half the value of property held by him in a joint tenancy created in 1909. No constitutional question is involved.

The words of the statute plainly apply to property held jointly, and there is no qualification as to the date of the creation of the tenancy. The Commissioner is seeking in this case to tax only the half of the property representing the decedent's interest. The decedent had unqualified control over that half at all times and until his death.

Since this control existed when the statute was passed, taxation involves no retroactive application of the statute so far as this half is concerned.

The decision in *Knox* v. *McElligott*, 258 U.S. 546, is not controlling here. There, the taxpayer voluntarily paid the tax upon one half of the value of the joint tenancy involved. The decision was that the tax later collected on the remaining half of the property was not justified by the statute. In the present case it is the tax on the first half of the value of the property—the decedent's interest—which is involved. That portion of the tax was conceded by the taxpayer in *Knox* v. *McElligott* and was not in any way in issue before this Court. There is nothing in the decision in that case to indicate that the implied qualification that the statute should not be retroactively applied should extend to that portion of the tax which involves no retroactivity.

The inclusion in Section 302 of the Revenue Act of 1924 of an express provision that all joint tenancies should be taxed whether created before or after the enactment of the statute does not support the petitioner's construction of the Revenue Act of 1921. The change in the statute was made in order to remove any question of construction in the future and to impose the tax on the entire value of property held in joint tenancy regardless of the date of creation of the estate.

An additional argument in support of our position is found in *Tyler* v. *United States*, 281 U.S.

497, and the many cases which have followed it. In these cases the constitutionality of the statute depended upon the fact that the tax was imposed prospectively and that there was a taxable event at death. There is, therefore, no basis for subjecting the statute to the implied qualification that it shall not have retroactive operation.

ARGUMENT

Section 402 (d) of the Revenue Act of 1921 (*infra*, p. 14) provides that there shall be included in the gross estate of a decedent the value of all property—

> To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, * * *.

The decedent died October 8, 1923, while this statute was in effect. At the time of his death he and his wife were joint tenants of certain real estate in Illinois. This joint tenancy had been created in 1909.

The sole question presented is whether this language of Section 402 (d) should be construed to require the inclusion in the decedent's gross estate of at least one half the value of the property held in joint tenancy. No constitutional question is involved. If the statute be construed to impose the tax in question, its constitutionality is settled by *Gwinn* v. *Commissioner*, 287 U.S. 224, and *Third National Bank* v. *White*, 287 U.S. 577.

From the time of the creation of the joint estate and until the decedent's death after the enactment of the Revenue Act of 1921, the decedent had unqualified control over his half of the joint tenancy. At all times during this period he had a legal right of severance and could have conveyed or mortgaged his share as he saw fit. *Lawler* v. *Byrne,* 252 Ill. 194; *Szymczak* v. *Szymczak,* 306 Ill. 541; *Hardin* v. *Wolf,* 318 Ill. 48. He could have brought suit for partition at any time, and while the tenancy lasted he was entitled to half the rents and profits. *Barr* v. *Barr,* 273 Ill. 621. The creation of the joint tenancy thus did not constitute a completed transfer of the entire property to the wife, nor in any way put the decedent's share beyond his exclusive control while he lived. *Gwinn* v. *Commissioner,* 287 U.S. 224. The words of the statute plainly apply to property held jointly, and there is no qualification as to the date of the creation of the tenancy. The Commissioner is seeking in this case to tax only the half of the property representing the decedent's interest. That half passed from the unqualified control of the decedent at his death and because of his death. Since the decedent's control over his half of the property existed when the statute was passed and continued until his death, taxation involves no retroactive application of the statute so far as this half is concerned. There is, therefore, no occasion to qualify the plain meaning of the words used by Congress by any rule of con-

struction. We submit, therefore, that the statute requires the imposition of the tax in question.

The petitioners' contention that the statute should not be construed to impose any tax in this case is based solely on this Court's decision in *Knox* v. *McElligott*, 258 U.S. 546. But that case plainly is not controlling here. The taxpayer there voluntarily paid the tax upon one-half of the value of the joint tenancy involved. The Collector of Internal Revenue assessed and collected a tax upon the second half, and the suit was brought to recover the tax paid on this second half. A judgment in the taxpayer's favor upon the pleadings was upheld by this Court. In the present case it is the tax on the first half of the value of the property—the decedent's interest—which is involved. That portion of the tax was conceded by the taxpayer in *Knox* v. *McElligott*, and was not in any way in issue before this Court. The Government does not contend, as the petitioners assert (Br. 2), that *Knox* v. *McElligott* has been overruled. The Government has followed that case by conceding the second half of the tax here—the tax on the survivor's interest. Our position is not an attack on *Knox* v. *McElligott*. We contend rather that that case should not be extended to cover facts which were not before the Court.[1]

[1] The argument that *Knox* v. *McElligott* does not prevent the taxation of the decedent's interest in the joint tenancy is forcefully presented in the opinion of the Board of Tax Appeals in this case. (R. 17–19.)

Not only do the facts in *Knox* v. *McElligott* make it clear that only the tax on the survivor's interest was involved, but this Court's reasoning is applicable only to that half. In referring to the decision of the District Court, which was upheld here, this Court said (pp. 548–549):

> And the court added "At the time the statute was passed Cornelia Kissam's [the survivor's] interest belonged to her." The court further observed, "From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control." The court rejected that conclusion and denied to the acts of Congress retroactive operation. * * *

It is thus plain that this Court's opinion was intended to apply only to the tax on the half of the value of the property represented by the survivor's interest in it. Since the Commissioner makes no claim that a tax on that half is due in this case, *Knox* v. *McElligott* has no application here. This Court did not hold that the statute was not to be construed to apply to joint tenancies created before 1916. Its holding was that to apply the law to the survivor's half of a joint tenancy created before 1916 would give the statute retroactive operation and that the statute should not be construed to have such an application. But there is nothing in the decision to indicate that the implied quali-

fication that the statute should not be retroactively applied should extend to that portion of the tax which involves no retroactivity.

In reaching its conclusion in *Knox* v. *McElligott*, this Court relied on *Shwab* v. *Doyle*, 258 U.S. 529, decided the same day. That case involved the tax on a transfer in contemplation of death made prior to the enactment of the Revenue Act of 1916. There the taxable event was the transfer, not death. Death was simply the occasion which justified the imposition of the tax. This Court concluded (pp. 536–537) that the statute "should not be construed to apply to transactions completed when the act became a law." In the present case the transaction was not completed by the creation of the tenancy, so far as the decedent's interest was concerned. That interest remained wholly subject to his control until his death, and the imposition of a tax on its transfer at his death involves no retroactive application of a statute "to transactions completed when the act became a law." The creation of the tenancy did put the survivor's half beyond the decedent's control. The reasoning of *Knox* v. *McElligott* and *Shwab* v. *Doyle* is, therefore, applicable to a tax on that half, and, accordingly, no effort is made to collect such a tax here.

In the petition for certiorari (p. 8), the petitioners suggest that their construction of the statute is supported by the fact that in Section 302 of the Revenue Act of 1924 (*infra*, p. 15) an express pro-

vision was included to the effect that the tax on joint tenancies and tenancies by the entirety should apply to all tenancies whether created before or after the enactment of the statute. It is urged that the construction placed upon the Revenue Act of 1921 by the court below in effect makes meaningless the retroactive provisions embodied in the later statutes. There are at least two answers to this argument: (1) In making the change in the language of the 1924 Act, Congress had no intention to construe the 1921 Act so far as its applicability to the decedent's interest in jointly owned property was concerned, but sought rather to remove any question of construction in the future. As this Court said in *Jordan* v. *Roche,* 228 U.S. 436, 446, with respect to a similar change in statute—

> The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.

(2) The change in the 1924 Act had a very definite purpose in that it imposed the tax on the *entire* value of property held by the decedent as a joint tenant, although the tenancy was created before the first Federal estate tax Act was passed. This is illustrated by the decision in *Third National Bank* v. *White,* 287 U.S. 577, where a tax on the entire value of property held by the entirety was sustained under the Revenue Act of 1924, although the tenancy was created before 1916.

The foregoing argument is sufficient, we contend, to show that as to the decedent's half interest in the property in question the statute has no retroactive application, and there is, therefore, no occasion for construing it not to apply when its words make it applicable to all property held in joint tenancy. An additional (but not essential) argument in support of our position is found in *Tyler* v. *United States,* 281 U.S. 497, and the many cases which have followed it. It is, of course true, as the petitioners assert (Br. 3), that the question in that case was one of constitutionality rather than of construction. But this Court's decision was based on the ground that the event on which the statute imposes the tax is the death of the decedent, not the creation of the estate. It is the fact of death which brings into being or enlarges the property rights of the survivor, and this is the incident which Congress has made the occasion for the tax. *Lang* v. *Commissioner,* 289 U.S. 109, 112–113. This event takes place after the passage of the taxing statute, regardless of when the tenancy was created. This conclusion is emphasized by this Court's decisions in *Phillips* v. *Dime Trust Co.,* 284 U.S. 160, where the statute was held constitutional when applied to tenancies by the entirety created before the passage of the applicable Act, and in *Third National Bank* v. *White,* 287 U.S. 577, where the statute was held constitutional when applied to a tenancy by the entirety created before the enact-

ment of the Revenue Act of 1916. In each case the constitutionality of the statute depended upon the fact that there was a taxable event at death and that the tax was consequently imposed prospectively.[2]

In the present case the result of the death of the decedent was not simply the coming into possession by the wife of an interest which was already owned irrevocably. Until the death of the husband the wife's interest in the property was limited by equivalent interests of the husband and by his power to sever, with the consequent destruction of her survivorship. Thus it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the generating source of new rights and was consequently the proper subject of an estate tax which was prospective in operation regardless of the time when the tenancy was created. *Gwinn* v. *Commissioner,* 287 U.S. 224, 228. There is, therefore, no basis for subjecting the statute to the implied qualification that it shall not have retroactive operation.

The decision of the court below that Section 402 (d) of the Revenue Act of 1921 should be construed to tax the decedent's interest in jointly

[2] This is emphasized by *Heiner* v. *Donnan*, 285 U.S. 312, where the transfer was made after the enactment of the applicable Act but was not one which was effective at death and was not testamentary in effect.

owned property is in accord with the conclusion of the Circuit Court of Appeals for the Eighth Circuit in *Whitehead* v. *Commissioner,* 64 F. (2d) 118, now pending on petition for certiorari, No. 172, October Term, 1933. Cf. *Safe Deposit & Trust Co.* v. *Tait,* 3 F. Supp. 51, 59–61 (D. Md.). See also *Grandin* v. *Heiner,* 44 F. (2d) 141 (C.C.A. 3d), affirmed on second appeal, 56 F. (2d) 1082 (C.C.A. 3d), certiorari denied, 286 U.S. 561, holding that the tax on the proceeds of insurance policies under the Revenue Act of 1918 is applicable to policies taken out before 1916 where the insured reserved the right to change the beneficiary.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other

person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof; * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U.S.C., Title 26, Sec. 1094.)

Treasury Regulations 63, promulgated under the Revenue Act of 1921:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of inter-

ests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

T. D. 3951, VI-1 Cumulative Bulletin 314:

Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations

No. 63, are hereby amended to read as follows:

Property held jointly or as tenants by the entirety.—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926.

A. W. MELLON,
Secretary of the Treasury.

T. D. 4293, IX-2 Cumulative Bulletin 425:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved, July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

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